GUARDIANSHIP MONITORING: A NATIONAL SURVEY OF COURT PRACTICES*

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I. INTRODUCTION

Guardianship is an important tool in today's society, but it must be monitored to protect those subject to abuse.[1] Recent newspaper accounts of abuse by guardians illustrate the importance of strong and effective guardianship monitoring. Consider the following excerpt from a 2005 article in a newspaper from Lansing, Michigan:

> Nearly 100 people can't access their money or must wait weeks for their checks to arrive as authorities continue to investigate [a] former Eaton County court guardian . . . . The longtime Charlotte attorney, 56, became the subject of a criminal probe after a deceased woman's family accused him of failing to produce $347,000 from her estate, which he oversaw. A judge ordered [him] to repay the money and signed a warrant for his arrest on a contempt of court charge last week.[2]

Another examination suggests that such abuse is widespread, as follows:

> The statewide system of appointing guardians to manage the finances and affairs of incapacitated people has created the opportunity for widespread corruption and needs to be radically overhauled, a grand jury concluded in a report filed yesterday in State Supreme Court in Queens. . . . The grand jury closely examined the case of a Long Island City lawyer who stole $2.1 million over a five-year period in cases involving [seventeen] incapacitated people. . . . The grand jury . . . said that guardians . . . are poorly trained and inadequately supervised by court appointees. It found, for instance, that even rudimentary financial reporting requirements are often ignored and independent audits are rare.[3]

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1. This Article was originally printed (with minor differences) as an AARP Public Policy Institute report of the same title. Naomi Karp & Erica Wood, *Guardianship Monitoring: A National Survey of Court Practices*, AARP Pub. Policy Inst. #2006-14 (June 2006) (available at http://assets.aarp.org/rgcenter/consume/2006_14_guardianship.pdf).

2. Kelly Hassett, *Money on Hold for 100 Clients of Ex-Guardian*, Lansing St. J. 1A (Aug. 18, 2005).

3. William Glaberson, *Grand Jury Urges Overhaul of Legal Guardianship System*, N.Y. Times B1 (Mar. 3, 2004).

To prevent this sort of criminal behavior against the elderly, states have a track record of implementing programs, though with the following varying success:

> Thirty years ago, California tried to put muscle into court oversight of conservators. The state created a corps of court investigators whose duties include knocking on the doors of elderly wards and checking that they are alive and well treated and have food in the refrigerator. They joined attorneys and examiners working for the probate courts who are supposed to comb through conservators' financial reports to make sure they aren't stealing or squandering clients' money. Such steps made California a leader in protecting the rights and resources of the elderly. Over the years, however, they have been eroded by tight budgets and an explosion in the number of elderly people under conservatorship.[4]

Guardianship is a relationship created by state law in which a court gives one person or entity (the guardian) the duty and power to make personal and/or property decisions for another (the ward or incapacitated person).[5] A judge appoints a guardian upon finding that an adult individual lacks capacity to make decisions for himself or herself.[6] Guardianship is a powerful legal tool that can bring good or ill for an increasing number of vulnerable people with cognitive impairments, affording needed protections yet drastically reducing fundamental rights.

Since guardians have authority to make surrogate personal and financial decisions for at-risk individuals frequently unable to speak on their own behalf, high fiduciary standards and strict accountability are critical. Court monitoring of guardians is required to ensure the welfare of incapacitated persons, identify abuses, and sanction guardians who demonstrate malfeasance.

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4. Jack Leonard, Robin Fields & Evelyn Larrubia, *Guardians for Profit: Justice Sleeps While Seniors Suffer*, L.A. Times 1 (Nov. 14, 2005).

5. *See* ABA Commn. on L. & Aging, State Statutory Guardianship Monitoring Chart (2005) (copy on file with *Stetson Law Review*) (displaying all fifty states' guardianship statutes) [hereinafter 2005 Monitoring Chart]. The chart was updated for 2006. For the updated 2006 Monitoring Chart, which shows the statutory revisions as of December 31, 2006, see ABA Commn. on L. & Aging, State Statutory Guardianship Monitoring Chart, http://www.abanet.org/aging/legislativeupdates/docs/Chart-Monitoring-1-07ewsbh.pdf (accessed Mar. 3, 2008). This Article, however, is based on the information from the 2005 chart.

6. *Id.*

In 1991, the American Bar Association (ABA) Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly conducted a national study on guardianship monitoring and recommended steps courts could take to strengthen guardian accountability (1991 ABA study).[7] The intervening fifteen years have seen vast changes in demographics, court technology, and adult guardianship law. These developments provide a compelling need to review guardianship-monitoring practices and assess changes since the ABA study. Therefore, in 2005 the AARP Public Policy Institute, in conjunction with the ABA Commission on Law and Aging, conducted an updated survey to examine current court practices for guardian oversight (2005 AARP survey).[8] This Article presents the 2005 survey findings.

II. BACKGROUND[9]

A. Overview of Guardianship Process

Guardianships are established through a legal process outlined in state law and are subject to court supervision. Guardianship has a "front end" (procedures providing due process protections before a finding of incapacity is made) and a "back end" (procedures for guardian oversight following appointment).[10]

The guardianship process begins at the "front end" with a petition alleging that an individual lacks decisionmaking capacity and cannot care for his or her own person and/or property.[11] The court sends notice of the allegation and of the upcoming hearing to the individual and to relatives and others specified by statute.[12] The individual may or may not have an attorney—and in some

7. These commissions are currently known as the Commission on Mental and Physical Disability Law and the Commission on Law and Aging, respectively. ABA Commn. Mental & Physical Disability L., *Commission and Related ABA Milestones*, http://www.abanet.org/disability/about/milestones.shtml (accessed Mar. 2, 2008).

8. See *infra* note 36 for the 1991 study and note 1 for the 2005 survey.

9. The background section is based in part on Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 Stetson L. Rev. 867 (2002).

10. Hurme & Wood, *supra* n. 9, at 867.

11. John W. Parry & Sally Balch Hurme, *Guardianship Monitoring and Enforcement Nationwide*, 15 Mental & Physical Disability L. Rptr. 304, 304 (1991).

12. *See e.g.* Fla. Stat. § 744.331 (2007) (requiring that notice be given to the alleged incapacitated person, his or her attorney, and any next of kin identified by the petition).

cases the court may appoint an attorney.[13] In addition, or instead in some states, the court may appoint an investigator, a *guardian ad litem* (representing the best interests of the individual during the proceeding and serving as the "eyes and ears" of the court), or a court visitor.[14] There may be a medical statement from a physician, a mental health specialist, or other healthcare professional.[15]

The hearing may be very brief if the guardianship is uncontested. If a person opposes the guardianship or the appointment of a particular guardian, the case could involve depositions, and the hearing could include extended testimony. The judge makes findings on the capacity of the individual and may appoint either a plenary (full) guardian or a limited guardian.[16] The appointment may be for guardianship of the person only, for guardianship of the property only (often known as "conservatorship"), or both.[17] The appointment may be an emergency appointment if the person is at risk of immediate harm.[18] In an emergency or urgent situation, this temporary appointment may be made before the hearing on the general guardianship.[19]

At the "back end," after the appointment is made, court procedures seek to ensure guardian accountability. The guardian may be required to post a bond and generally must submit periodic reports and accountings following the appointment.[20] If the

13. *See e.g. id.* at § 744.331(2)(b) (stating that "[t]he court shall appoint an attorney for each person alleged to be incapacitated in all cases involving a petition for adjudication of incapacity.").

14. Jennifer L. Wright, *Protecting Who from What, and Why, and How: A Proposal for an Integrative Approach to Adult Proceedings*, 12 Elder L.J. 53, 94 (2004).

15. *See e.g.* Fla. Stat. § 744.331(3) (requiring a physician to file a written report to use in making a decision regarding capacity and guardianship).

16. *See id.* at § 744.344(1) (stating that "[t]he order appointing a guardian must state the nature of the guardianship as either plenary or limited").

17. *See id.* at § 744.102(9) (defining "guardian" as "a person who has been appointed by the court to act on behalf of a ward's person or property, or both").

18. *See id.* at § 744.3031(1) (giving a court the authority to appoint "an emergency temporary guardian" if the court finds that "there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken").

19. *Id.* (providing that emergency appointment may be done through summary proceedings before the regular appointment of a guardian).

20. *See id.* at § 744.1085(2) (requiring guardians to post bonds with the clerk of court); *id.* at § 744.367 (requiring guardians to file annual reports with the court consisting of an annual accounting and an annual fiscal plan).

reports are not forthcoming, the judge may call the guardian into court to explain his or her failure to timely file. The court may sanction or remove any guardian who demonstrates malfeasance.[21] If the guardianship is no longer necessary, the court can restore the rights of the individual.[22]

While the above generalized description gives a broad-brush understanding of the process, it differs from state to state, court to court, and judge to judge. This 2005 survey examines the "back end" of guardianship, inquiring about the practices of courts throughout the country. The survey responds to striking demographic shifts and societal trends that will increase the expected number of guardianship cases and is based on a substantial history of reform efforts in guardianship monitoring, as described below.

B. Demographic and Societal Shifts

The need for effective court-monitoring practices is heightened by on-going demographic trends that will sharply boost the number of appointments in coming years. The older population (age 65 and older) numbered 35.9 million in 2003.[23] As the baby boomers come of age, the older population will more than double, reaching 71.5 million by 2030.[24] Within the older population, the number of "old old" (age 85 and older) is growing especially rapidly and is expected to increase from 4.7 million in 2003 to 9.6 million in 2030.[25] At the same time, Alzheimer's disease and related dementias are becoming more prevalent. Today, 4.5 million Americans have Alzheimer's disease.[26] The number has more

21. *See id.* at § 744.367(5) (stating "[i]f the guardian fails to timely file the annual guardianship report, the judge may impose sanctions which may include contempt, removal of the guardian, or other sanctions provided by law").

22. *See id.* at § 744.5221 (providing for the discharge of a guardian where the ward is restored to capacity).

23. Administration on Aging, U.S. Dept. of Health and Human Servs., *A Profile of Older Americans: 2004*, http://www.aoa.gov/prof/Statistics/profile/2004/2004profile.pdf (accessed Mar. 2, 2008).

24. *Id.* at 3.

25. *Id.*; U.S. Census Bureau, *U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin*, http://www.census.gov/ipc/www/usinterimproj/natprojtab02a.pdf (Mar. 18, 2004).

26. Stephen McConnell, Testimony, *Presented to the U.S. Senate Special Committee on Aging* (Alzheimer's Assn., Apr. 27, 2007) (available at http://www.alz.org/join_the_cause_stephen_mcconnell_42704.asp).

than doubled since 1980 and will continue to grow—reaching between 11.3 and 16 million by 2050 unless a cure or preventive measures are discovered.[27] Moreover, guardianship also serves a younger population of adults with mental retardation, developmental disabilities, and mental illnesses. Today "[i]t is estimated that there are [7] to [8] million Americans of all ages who experience mental retardation or intellectual disabilities. Intellectual disabilities affect about one in ten families in the USA."[28] This number will rise with new forms of medical treatment, which will increase lifespans, and an increasing number will outlive family caregivers.[29]

At the same time, incidents of elder abuse are rising. While statistics are scant, it is estimated that

> between 1 and 2 million Americans age [sixty-five] or older have been injured, exploited, or otherwise mistreated by someone on whom they depended for care or protection. The frequency of occurrence of elder mistreatment will undoubtedly increase over the next several decades, as the population ages.[30]

In response to demographic changes and the increased need for surrogate decisionmaking, corporate or agency guardianship is growing. Over the last twenty years, a burgeoning number of not-for-profit and for-profit agencies—as well as public guardianship programs—has developed to serve the at-risk, "unbefriended" population, that is, those who have no family or friends available and qualified to serve as guardian.[31] Agency guardians frequently

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27. *Id.*

28. President's Comm. for People with Intell. Disabilities, Administration for Children & Fams., U.S. Dept. Health & Human Servs., *The Role of the PCPIP*, http://www.acf.hhs.gov/programs/pcpid/pcpid_fact.html (accessed Mar. 2, 2008).

29. Estimates for adults age sixty and over with mental disabilities, mental retardation, and other developmental disabilities (such as autism, cerebral palsy, and epilepsy) range between 60,000 and 1.6 million. Am. Assn. Intell. & Developmental Disabilities, *Fact Sheet: Aging, Older Adults and Their Aging Caregivers*, http://www.aamr.org/Policies/faq_aging.shtml (accessed Mar. 2, 2008). This number is growing quickly, and though many persons have yet to be identified, it is expected that there will be several million such adults by the year 2030. *Id.*

30. *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* 1 (Richard J. Bonnie & Robert B. Wallace eds., Natl. Academic Press 2003).

31. Jack Leonard, Jack & Robin Fields, *Task Force to Analyze Guardian System*, L.A. Times A1 (Jan. 14, 2006). While national data is lacking, the *Los Angeles Times* reported

must make critical care decisions about multiple wards, often with little knowledge of their lives or past values, and sometimes with high caseloads and insufficient staffing.[32] All of these trends combine to underscore the dire need for oversight when fundamental rights and financial resources are transferred to guardians, leaving individuals with diminished capacity at their mercy.

C. History of Guardianship-Monitoring-Reform Efforts

A comprehensive and compelling 1987 Associated Press (AP) series, entitled *Guardians of the Elderly: An Ailing System*,[33] triggered close to two decades of adult-guardianship reform, igniting a rush to revise guardianship statutes, prepare training materials, and strengthen court practices. The series contended that "overworked and understaffed court systems frequently break down, abandoning those incapable of caring for themselves" and that courts "routinely take the word of a guardian or attorney without independent checking or full hearings."[34] Among the reform activities launched following the AP series were efforts aimed specifically at guardianship monitoring, including the following:

- **Wingspread Recommendations:** In 1988, the ABA convened a landmark interdisciplinary National Guardianship Symposium (Wingspread Conference) that made six recommendations on accountability of guardians (training and orientation, review of guardian reports, public knowledge and involvement, guardianship standards and plans, role of attorneys, and role of judges).[35]

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that, in California alone, about 500 professional guardians are caring for at least 4,600 people and managing $1.5 billion in assets. *Id.*

32. *See infra* n. 52 (providing examples of these problems from multiple geographic regions).

33. AP, *Guardians of the Elderly: An Ailing System* (Sept. 1987) (comprising a series of articles related to issues throughout the United States) (copy on file with *Stetson Law Review*).

34. Fred Bayles & Scott McCartney, *Guardianship; Few Safeguards & Guardianship; Minnie Monoff Didn't Want Protection; She Wanted Freedom*, L.A. Times A2 (Sept. 27, 1987).

35. ABA Commn. Mentally Disabled & Commn. Leg. Problems of the Elderly, *Guardianship: An Agenda for Reform—Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* 23–27 (ABA 1989) [hereinafter ABA Commn.].

- **National Monitoring Study:** The Wingspread recommendations in turn fueled a groundbreaking 1991 ABA study, *Steps to Enhance Guardianship Monitoring*,[36] funded by the State Justice Institute. The study included a national survey and six intensive site visits.[37] The report outlined ten recommended "monitoring steps" drawn from actual practices in diverse jurisdictions.[38]
- **Volunteer Guardianship Monitoring:** Also in 1991, AARP initiated a National Volunteer Guardianship Monitoring Project funded by the State Justice Institute.[39] This project used trained volunteers as court visitors, auditors, and records researchers. The model was adopted by over fifty courts throughout the country.[40]
- **Judicial Review:** In the same year, St. Louis University's School of Law and School of Medicine developed a national model for judicial review of guardian performance based on an analysis of monitoring in six courts.[41]
- **Probate Court Standards:** In 1993, a Commission on National Probate Court Standards set out specific procedures for guardianship monitoring in the *National Probate Court Standards* (training and outreach, reports by guardians, practices and procedures for review of reports, reevaluation of the necessity for guardianship, enforcement of court orders, and final report before discharge).[42]
- **Uniform Guardianship and Protective Proceedings Act:** The Uniform Guardianship Act, originally Title V of the Uniform Probate Code adopted in 1969,

36. Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring* (ABA 1991).
37. *Id.* at 72–74.
38. *Id.* at 1–3.
39. Susan Miler & Sally Balch Hurme, *Guardianship Monitoring: An Advocate's Role*, 25 Clearinghouse Rev. 654, 654 (1991).
40. *Id.* at 655; Hurme & Wood, *supra* n. 9, at 870.
41. Hurme & Wood, *supra* n. 9, at 870.
42. Commn. on Natl. Prob. Ct. Stands. & Advisory Comm. on Interstate Guardianships, *National Probate Court Standards* 70–75 (Natl. Ctr. St. Cts. 1993) [hereinafter NPCS].

was revised in 1982 and again in 1997.[43] The latter revision included provisions on guardianship monitoring, and the commentary highlighted the importance of "[a]n independent monitoring system . . . for a court to adequately safeguard against abuses."[44]

- **Wingspan Conference:** In 2001, the Second National Guardianship Conference (Wingspan Conference) made seven recommendations on monitoring and accountability, drawing on and clarifying the earlier Wingspread statements.[45] In 2004, several national groups convened to focus specifically on practical implementation of selected Wingspan recommendations, including those on monitoring.[46]

- **Senate Hearing and Government Accountability Office Report:** In 2003, the United States Senate Special Committee on Aging held a hearing entitled *Guardianships over the Elderly: Security Provided or Freedoms Denied?*[47] The Committee Chair observed that "substantial sums of [f]ederal money . . . are administered and potentially misused by guardians" and that

> the imposition of guardianship without adequate protection and oversight may actually result in the loss of liberty and property for the very persons whom these arrangements are intended to protect.[48]

The hearing led to a 2004 Government Accountability Office (GAO) report, *Guardianships: Collaboration*

43. Natl. Conf. Commnrs. on Unif. St. Ls., *Uniform Guardianship and Protective Proceedings Act*, http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ugppa97.pdf (1997).

44. *Id.* at 70.

45. Wingspan, *The Second National Guardianship Conference: Recommendations*, 31 Stetson L. Rev. 595, 605–607 (2002).

46. Natl. Acad. Elder L. Attys., Natl. Guardianship Assoc. & Natl. College Prob. JJ., *National Wingspan Implementation Session: Action Steps on Adult Guardianship Progress* (2004) (available at http://www.maricopa.gov/pubfid/pdf/wingspanreport.pdf) (accessed Mar. 2, 2008) [hereinafter Wingspan 2004].

47. Sen. Spec. Comm. Aging, *Guardianships over the Elderly: Security Provided or Freedoms Denied?* 108th Cong. 2 (Feb. 11, 2003).

48. *Id.*

Needed to Protect Incapacitated Elderly People.[49] The GAO report found that

> [a]ll states have laws requiring courts to oversee guardianships, but court implementation varies. Most require guardians to submit periodic reports, but do not specify court review of these reports. . . . [T]he extent to which the courts and [federal] agencies leave elderly incapacitated people at risk is unknown [due to lack of data].[50]

- **State Legislation:** Finally during the last fifteen years, state legislatures have sought to bolster guardian accountability. Many jurisdictions have made changes in the frequency and contents of guardian reports and accounts, bonding requirements, court-review procedures, and sanctions for guardians who fail to file a timely report or demonstrate malfeasance.[51]

Despite these reform measures, judicial-monitoring practices appear to vary and, in many areas, remain lax. Continuing news accounts throughout the 1990s and beyond indicate that serious problems persist.[52] Recent press stories included a two-part *Washington Post* series in 2003 entitled, *Misplaced Trust: Guardians in the District*,[53] which alleged that "the [District of Columbia] court's probate division . . . has repeatedly allowed its charges to

49. U.S. Govt. Accountability Off., *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People* (Pub. No. GAO-04-655, July 2004) (available at http://www.gao.gov/new.items/d04655.pdf) [hereinafter GAO].

50. *Id.* at "What GAO Found" (introductory section), 31.

51. *See* 2005 Monitoring Chart, *supra* n. 5 (outlining the status of guardianship monitoring in all fifty states).

52. *See e.g.* Glaberson, *supra* n. 3 (discussing a grand jury report that identified loopholes in New York's guardianship system allowing for theft); Lou Kilzer & Sue Lindsay, *The Probate Pit: Busted System, Broken Lives*, Rocky Mountain News (Apr. 7, 2001) (discussing problems with Colorado's probate system); Paul Rubin, *Checks & Imbalances: How the State's Leading Fiduciary Helped Herself to the Funds of the Helpless*, Phoenix New Times (June 15, 2000) (detailing abuses of a guardianship service provider in Arizona); Wendy Wendland-Bowyer, *Guardian System Overrun by Abuse*, Det. Free Press 1A (Oct. 25, 2003) (pointing out serious flaws in Michigan's method of guardian appointment); Wendy Wendland-Bowyer, *Who's Watching the Guardians?* Det. Free Press 1A (May 24, 2000) (investigating guardianship abuse in Michigan's probate system).

53. Carol D. Leonnig, Lena H. Sun & Sarah Cohen, *Under Court, Vulnerable Became Victims*, Wash. Post A01 (June 15, 2003).

be forgotten and victimized."[54] The *Post*'s review of more than ten years of case dockets and hundreds of court files, as well as dozens of interviews, found hundreds of cases where court-appointed protectors violated court requirements. The *Post* reported that since 1995, one of five guardians had gone years without reporting to the court.[55]

In November 2005, the *Los Angeles Times* published a four-part series entitled, *Guardians for Profit*,[56] detailing the findings from a review of more than 2,400 cases, including every case handled by professional guardians in Southern California between 1997 and 2003.[57] The *Los Angeles Times* found many cases in which guardians (called "conservators" in California) ignored the needs of their wards, plundered estates, and charged hefty fees.[58] The series observed that court oversight is "erratic and superficial" and that judges "rarely take action against conservators."[59] These and similar press accounts detail guardianship abuses not substantially different from those the AP described some eighteen years earlier.

Whether such accounts reflect isolated examples of abuse in an otherwise well-functioning process or reflect the norm is unknown. Indeed, policymakers, advocates, and the legal and judicial system are working in the dark in assessing adult guardianship because there is very little data on this matter. The 2004 GAO report noted that most courts "do not maintain information needed for effective monitoring and oversight of guardianships," hence the reason for the AARP survey.[60]

54. *Id.*

55. *Id.*; Sarah Cohen, Carol D. Leonnig & April Witt, *Rights and Funds Can Evaporate Quickly*, Wash. Post A01 (June 16, 2003).

56. Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit*, L.A. Times A1 (Nov. 13–16, 2005).

57. *Id.*

58. *Id.*

59. Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit: When a Family Matter Turns into a Business*, L.A. Times A1 (Nov. 13, 2005).

60. *See* GAO, *supra* n. 49, at 9 (stating that "most state courts surveyed do not maintain information needed for effective monitoring and oversight of guardianships").

III. METHODOLOGY

AARP Public Policy Institute, in collaboration with the ABA Commission on Law and Aging, conducted a national survey of how courts monitor guardianship cases, the first such study in fifteen years.[61] This survey aimed to replicate and build upon the 1991 ABA study of guardianship monitoring and to identify effective measures that aid courts in overseeing the performance of guardians.

This Article presents the results of the first phase of the survey, an Internet-based survey in 2005 of a diverse group of professionals with expertise in guardianship monitoring. The second phase of the survey conducted in 2006 and continuing into early 2007 included on-site court visits to observe monitoring practices and interview stakeholders, supplemental in-depth telephone interviews, and meetings with experts to explore findings and develop recommendations for promising practices.[62]

A. Survey Process

The goal of the 2005 survey was to elicit information about guardianship-monitoring practices nationwide. While all states have known statutory-monitoring requirements, the survey sought to do the following: (1) identify what courts are actually doing in this arena; (2) ascertain whether the practices meet, exceed, or fall short of requirements imposed by statutes and court rules; and (3) identify practices that may be "ahead of the curve."[63]

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61. *Supra* n. 1.

62. To follow up Phase I of the 2005 national survey, AARP Public Policy Institute, in collaboration with the ABA Commission on Law and Aging, conducted Phase II of the national guardianship monitoring study—a three-part examination of "promising practices" in guardianship monitoring, including the following: (1) site visits to four courts with exemplary practices (Maricopa County, Arizona; Suffolk County, New York; Ada County, Idaho; and Tarrant County, Texas); (2) telephone interviews with additional courts; and (3) a symposium of experts in February 2007 to identify and discuss monitoring approaches and techniques. From all of these sources, the project team accumulated a list of ideas from which probate and general jurisdiction courts can draw. The site-visit findings and descriptions of promising practices are set out in Karp and Wood's 2007 report. Naomi Karp & Erica Wood, *Guarding the Guardians: Promising Practices for Court Monitoring* 20–65 (AARP 2007). For the Phase II report, see the AARP Public Policy Institute Web site at http://www.aarp.org/research/legal/guardianships/2007_21_guardians.html.

63. *See* Karp & Wood, *supra* n. 1, at app. A (listing the questions in the 2005 survey).

In designing the survey questionnaire, project staff relied upon the assistance of an expert advisory panel with representation from the National Guardianship Association (NGA), National College of Probate Judges (NCPJ), National Academy of Elder Law Attorneys (NAELA), National Association for Court Management (NACM), and National Disability Rights Network (NDRN). In addition, the advisory panel included Sally Hurme (of AARP), who conducted the 1991 monitoring study for the ABA.

The 2005 AARP survey questionnaire was based on the written "Recommended Steps"[64] to enhance guardianship monitoring resulting from the 1991 study and included additional areas of inquiry that have become particularly relevant in the last several years, such as data collection and use of technology. Advisory Committee members reviewed the draft questionnaire and provided detailed feedback. In addition, four individuals (two guardians, an elder law attorney, and a probate judge) tested the survey and contributed comments. The final survey instrument included thirty-five questions concerning topics such as:

- Background on state laws and formal court rules
- Reporting, accounting, and care-plan practices
- Court assistance to guardians
- Tracking and enforcement
- Responsibility for monitoring activities
- Assessment of guardianship by the court
- Funding
- Attorney activities
- Court/community interaction
- Data, technology, and court files

Investigators and Advisory Committee members agreed that the categories of individuals who could provide the most knowledge and expertise in monitoring practices included guardians, probate judges, court managers, elder law attorneys, and legal representatives of people with disabilities. To maximize the num-

64. Wingspan, *supra* n. 45, at 605–607.

ber of respondents in these professions from across the nation, the project staff sought membership lists from the organizations listed above as well as lists of Registered and Master Guardians from the National Guardianship Foundation. In answering the questions, survey respondents were asked to refer to the jurisdiction with which they have the most familiarity.

To distribute the survey efficiently and to ease the burden on respondents, AARP created a Web site for the survey questionnaire. Potential respondents were notified of the survey by e-mail and could link directly to the Web site and complete the questions online.

All targeted organizations agreed to assist in survey dissemination either by providing mailing lists or by using their listservs. Survey recipients received an advance e-mail explaining the project and encouraging participation. Since NAELA and NDRN opted not to share the names and e-mail addresses of their members, they distributed all relevant e-mails through their own channels, the NAELA Guardianship Special Interest Group listserv and the NDRN Legal Directors listserv. AARP sent the survey to NGA members, Registered Guardians, Master Guardians, NCPJ members, and NACM members.[65] AARP staff and cooperating organizations sent the survey to approximately 2,100 individuals and received 387 completed responses.[66] Respondents are not a nationally representative sample due to the nature of the survey distribution.

B. Respondents

1. Geographic Distribution

The 387 survey respondents are from forty-three states and the District of Columbia. The states with the highest number of responses include the following: Florida—fifty-four respondents (14%); California—thirty-two respondents (8.3%); Texas and

65. Unfortunately, NACM was unable to provide a list of court managers working in courts with jurisdiction over guardianship cases, making their list over-inclusive for survey purposes.

66. Of the e-mails sent by AARP, sixty-two were returned as "undeliverable." NAELA reported some "undeliverable" e-mails but did not keep track of the number. The response rate was 19%. This estimated response is likely to be somewhat lower than the actual response rate because it does not factor in the undeliverable e-mails sent by NAELA.

Michigan—twenty-one respondents each (5.4%); Washington—eighteen respondents (4.7%); and Illinois—seventeen respondents (4.4%).[67] There were no respondents from Arkansas, Hawaii, Mississippi, Nebraska, North Carolina, South Dakota, or West Virginia.

2. Role in Guardianship Process

Respondents identified their most frequent role in the guardianship process as follows: 204 guardians (52.7%); 56 attorneys (14.5%); 26 judges or special masters (6.7%); 41 court administrators, managers, or staff (10.6%); 10 court visitors, evaluators, or investigators[68] (2.6%); 6 *guardians ad litem*[69] (1.6%); and 44 "others" (11.4%).

The forty-four respondents who stated that their most frequent role was "other" included guardianship-program administrators or coordinators (8); care managers (6); miscellaneous court roles (5); volunteer guardians or volunteer guardianship-program administrators (5); attorneys not representing parties to guardi-

67. According to the 2005 United States Census Bureau population estimates, California had the highest number of people age sixty-five and older (3.8 million) in 2004, followed by Florida (2.9 million), New York (2.5 million), Texas (2.2 million), Pennsylvania (1.9 million), Ohio (1.5 million), and Illinois (1.5 million). Population Div., U.S. Census Bureau, *Estimates of the Resident Population by Selected Age Groups for the United States and for Puerto Rico*, Tbl. 1-RES (July 1, 2004) (available at http://www.census.gov/popest/states/asrh/tables/SC-EST2004-01Res.xls).

68. The National Guardianship Association's 2005 publication, *The Fundamentals of Guardianship: What Every Guardian Needs to Know*, defines "court visitor, monitor, investigator" as "[a] person appointed by the court to provide the court with information concerning a ward or a guardian." Natl. Guardianship Assn., *The Fundamentals of Guardianship: What Every Guardian Needs to Know* 127 (2005). In *Guardianships of Adults*, Mary Joy Quinn explained that

> (c)ourt appointees have different labels depending on individual state law. . . . They may be called court investigators, court visitors, court evaluators, or guardians ad litem. . . . In general, court investigators perform two main functions: (1) provide due process advisements to the person who is the subject of the proposed guardianship and (2) perform an independent assessment of the circumstances of the person with diminished capacity.

Mary Joy Quinn, *Guardianships of Adults* 141–142 (Springer 2005).

69. The Glossary of *The Fundamentals of Guardianship* defines a "guardian ad litem" as "[a] person appointed by the [c]ourt to make an impartial inquiry into a situation and report to the [c]ourt." Natl. Guardianship Assn., *supra* n. 68, at 129. In *Guardianships of Adults*, Quinn stated that "[s]tate laws are vague about the actual duties of guardians ad litem, which has resulted in confusion as to whether they are representing the person with diminished capacity as any attorney would represent any client or if they are acting as an informational arm of the court." Quinn, *supra* n. 68, at 142.

anship cases (4); advocates (2); social workers (2); and trustees (2). The remaining ten respondents could not be readily grouped or categorized.

3. Organizational Affiliation

There were 359 respondents listing at least one affiliation, while 28 did not answer the question. Only a handful identified more than one affiliation. The respondents replied as follows:

- 270 were members of the NGA and/or were Registered Guardians or Master Guardians
- 38 were members of the NAELA
- 24 were members of the NCPJ
- 17 were members of the NACM
- 25 were members of the NDRN.

IV. FINDINGS

A. Guardian-Reporting Requirements

1. Filing of Personal Status Reports

The primary way that courts are informed about the individual's status after a guardianship has been established is through periodic guardian reports. The 1991 ABA study recommended that "[t]he guardian should be required to report to the court . . . on the ward's personal status and finances no less than once a year."[70] Requiring periodic personal status reports "is now generally accepted in courts across the country."[71] The most frequent requirement is for annual reporting. The Uniform Guardianship and Protective Proceedings Act requires annual reports and accounts.[72] The Wingspan 2001 recommendations urge "mandatory annual reports of the person and annual financial accountings."[73]

70. Hurme, *supra* n. 36, at 15.
71. Hurme & Wood, *supra* n. 9, at 898.
72. Unif. Guardianship & Protective Procs. Act §§ 317, 420 (1998); 8A U.L.A. §§ 5-317, 5-420 (2001).
73. Wingspan, *supra* n. 45, at 605.

As of the end of 2004, all but two states[74] statutorily required personal status reports although the required frequency of filing varied. The majority of state statutes require personal status reports to be filed at least annually although some leave the frequency to the discretion of the court.[75]

In the 1991 ABA study, although forty-three state statutes required personal status reports, respondents in only eighteen states said the court uniformly requires guardians to file such reports.[76] Moreover, respondents from eleven states said guardians were not routinely required to file these reports.[77] Answers from respondents in the remaining nineteen states showed great variability.[78] Overall, "131 respondents [67.5%] said that personal status reports were required, 40 said they were not, while 23 said that reporting was optional."[79]

In the 2005 AARP survey, a substantial majority of respondents (74.2%) reported that the court practice is to require annual filing of these reports, yet an even larger number of respondents (79.8%) reported that their statute or rule requires annual filing. This statistical comparison reveals that significantly fewer respondents reported annual report requirements in local court practice than under statute or court rule. This finding seems to indicate that a small but statistically significant number of courts do not impose their jurisdiction's specific statutory or regulatory mandate of annual reporting.[80]

74. Delaware and Massachusetts.

75. *See* 2005 Monitoring Chart, *supra* n. 5 (displaying all fifty states' guardianship statutes).

76. Hurme, *supra* n. 36, at 17.

77. *Id.*

78. *Id.*

79. *Id.*

80. The survey also revealed that 89.4% of respondents stated that their statute or court rule required filing personal status reports at some regular interval (annual, more than annual, or less than annual), while 83.8% of respondents said that their court required regular filing (again, combining annual, more than annual, and less than annual). There was no significant difference between statute or court rule and actual practice for the other possible options for frequency requirements. Four percent of respondents stated that the court's practice was to require personal status reports on an "as needed" basis.

2. Format of Personal Status Reports

Guardian reports must provide the court with sufficient information about the person's condition and care, yet not be overly burdensome to fill out. The 1991 ABA study recommended that

> [t]he guardian's written report on the ward's personal status should be designed to encourage some narrative responses that will provide the reviewer with a concise explanation of the ward's circumstances, the care the guardian is providing and the need to continue the guardianship.[81]

The 2005 AARP survey found that the format and required elements for personal status reports varies. The most common format required is "limited or brief narrative responses" (44.2%). Approximately one-fourth of the respondents stated that their court's report "combines checklist and narrative" (25.6%). Thus, the majority of respondents practice in courts requiring a moderate amount of detail. Only 10.1% of respondents report that their courts require comprehensive narratives (the most detailed option), and just 2.6% reported using a checklist (probably the least detailed). Furthermore, 10.1% of respondents stated that their courts do not require personal status reports from guardians of the person, and 7.5% did not know their court's practice.[82]

3. Accountings

Due to the probate roots of guardianship, probate courts are historically familiar with requiring and auditing accounts from executors and guardians of the estate. Since the 1988 Wingspread Conference recommendations, experts and professional groups have repeatedly recommended that courts require guardians of the estate to file reports on their ward's finances at least annually. These recommendations can be found in the 1991 ABA study, the Uniform Guardianship and Protective Proceedings Act,

81. Hurme, *supra* n. 36, at 15.

82. This response seems to contradict the response to a separate question about the court's practice regarding the required frequency of personal status reports. In response to that question, only 29 (7.5%) of the respondents stated that their court does not require these reports (compared to 39 (10.1%) here). The same number of respondents, 387, answered both questions.

the *National Probate Court Standards*, and the 2001 Wingspan Conference recommendations.[83] All states statutorily require periodic accountings, with annual being the most common time interval, although a number of states defer the frequency of filing to the probate court's discretion.

Eighty-six percent of the 2005 survey respondents stated that their statute or court rule requires accountings annually. Slightly fewer (82.7%) reported that their court requires accountings annually, and, although slight, that difference was significant. Other findings regarding local court requirements on accountings included: (1) accountings required more frequently than annually (0.8%); (2) accountings required less frequently than annually (7.8%); (3) accountings requested as needed (2.6%); (4) no accountings required (1.3%); and (5) don't know (4.9%).[84]

B. Guardianship Plans

A guardianship plan is a forward-looking document submitted by a guardian to the court, describing the proposed care of the individual and reporting on past care. Guardianship plans provide a baseline inventory that enables the court to measure the guardian's future performance. The concept of a guardianship plan, introduced in 1979 in an ABA model guardianship statute,[85] has been echoed in every major set of guardianship recommendations.[86] In contrast to accountings and personal status reports, only a few states mandate care plans by statute in the following ways: with the filing of the petition, following appointment of a guardian, or with the annual report.[87] There are few data on whether guardianship plans are actually in use.

The 2005 survey reveals that 34.1% of respondents practice in a court that consistently requires guardians to file plans for

83. Hurme & Wood, *supra* n. 9, at 897–899; Wingspan, *supra* n. 45, at 605; Unif. Guardianship & Protective Procs. Act § 317(c); NPCS, *supra* n. 42, at 71.

84. None of these other options was significantly different in practice from what is required by statute or court rule.

85. Model Guardianship & Conservatorship Stat. § 17(2), *reprinted in* Bruce Dennis Sales et al., *Disabled Persons and the Law: State Legislative Issues* 562–563 (Plenum Press 1982).

86. Hurme & Wood, *supra* n. 9, at 892–893.

87. States requiring care plans include Oklahoma, Washington, Colorado, Maryland, New Hampshire, and Maine. Quinn, *supra* n. 68, at 171–172.

future care of the individual, and 9.3% of respondents reported that the court sometimes requires guardians to file plans. Almost half of respondents (48.1%) stated that their court does not require filing of plans, and 8.5% of respondents did not know. Respondents reported significantly more local courts consistently or sometimes requiring guardians to file plans (43.4%) than statutory or court rules requiring filing (37.7%).

C. Court Assistance to Guardians

Serving as a guardian is "one of society's most serious and demanding roles."[88] The guardian must step into the shoes of another and make critical decisions about care and property—sometimes even about life and death. To do an effective job, guardians require assistance and direction from the court in the form of training, clear specification of reporting responsibilities, and supplying of reporting forms along with samples showing how they should be filled out. The 1991 ABA study concluded that "[d]espite the difficulty of the guardian's tasks, in many instances the guardian does not receive much assistance in taking on these new responsibilities."[89] Over 40% of the 1991 study respondents rated "overall assistance given to new guardians" as low.[90]

1. Guardian Training

Since guardians must be knowledgeable about a vast array of topics, ranging from housing and long-term care to medical and psychological treatment to accounting, policy recommendations since the 1980s have endorsed court-sponsored training and ongoing assistance to guardians. For example, the *National Probate Court Standards* urge that probate courts "develop and implement programs for the orientation and training of guardians."[91] Training and assistance may include guidance in reporting responsibilities.

88. ABA Commn., *supra* n. 35, at 23.

89. Hurme, *supra* n. 36, at 25.

90. *Id.* "[T]he average score of all respondents within 21 states was below a 3, with 1 being the lowest and 6 being the highest. Forty-three percent (85 out of 194) of the respondents rated the assistance as a 1 or 2; five percent (10 out of 194) gave the highest rating (6) to the assistance given guardians." *Id.*

91. NPCS, *supra* n. 42, at 69.

Few state statutes mandate guardianship training and assistance, and such support generally is left to the initiative of the court. Florida and New York are exceptions; each has mandatory training (that can be waived under certain circumstances) with specified course content, including instruction in the guardian's duties and responsibilities.[92] Arizona and Washington have training requirements as part of a certification program for private professional guardians.[93] In the 1991 ABA study, 48% of respondents named lack of guardian training as a serious problem, 28% said it was the most important problem, and 51% listed training as a key way to improve monitoring practices.[94]

According to the 2005 survey, the most commonly available resource for guardians is court-provided written instructions or manuals (43.2% of respondents). More than one-third of respondents (37.5%) reported that training sessions are sponsored by noncourt entities in their jurisdiction. About 17% of respondents (17.1%) reported that videos are available for viewing in the courthouse or elsewhere. Just over 10% of respondents (10.9%) stated that court-provided training sessions are available. Over one-fifth of respondents (22%) said that no resources are available to guardians, and 8.8% of respondents did not know. More than one-quarter of respondents (27.1%) reported that multiple resources are available.[95]

2. Guidance on Reporting Responsibilities

In addition to training, courts can assist guardians by providing clear direction on reporting and accounting responsibilities. A significant majority of the 2005 survey respondents (62.8%) reported that their court routinely specifies reporting and accounting responsibilities in the initial guardianship order or letter. About one-fourth of respondents (24.8%) stated that court orders typically do not include reporting responsibilities, 5.4% said that

92. Hurme & Wood, *supra* n. 9, at 877–878.

93. *Id.* at 887–889. For instance, the certification process in Arizona requires the guardian to attend training. *Id.* at 889.

94. Hurme, *supra* n. 36, at 28.

95. A handful of responses were discounted because they either checked one of the listed resources and "no resources available" or one of the listed resources and "don't know."

their court sometimes specifies reporting responsibilities, and 7% did not know.

3. Reporting Forms and Samples

The 2005 survey found that the most common source of reporting and accounting forms is the court clerk (42.6% of respondents). One-third of respondents (33.1%) reported that forms are on the court's Web site, and an equal number of respondents (33.1%) stated that the court relies on attorneys to make forms available. Only 19.9% of respondents said that the court routinely sends forms to guardians, and 13.7% were unaware of their court's practice. Almost one-third of respondents (31.5%) noted that their court uses more than one method of furnishing reporting and accounting forms.

Finally, samples or models of appropriately prepared personal status reports and accountings may be helpful to guardians. Over 40% of survey respondents (40.1%) said that no samples were available. Similar numbers of respondents indicated that their court relies on attorneys to make samples available (20.7%) or makes samples available from the clerk (18.1%). A smaller number of respondents stated that samples are available on the court's Web site (8.8%). Very few reported that the court routinely sends samples to guardians (3.9%). Some 11.9% said the court uses more than one means of providing samples or models of appropriately prepared reports, and 19.6% of respondents did not know.

D. Enforcing Reporting Requirements

The 1988 Wingspread Conference participants recommended that courts "vigorously enforce timely filing of all required reports."[96] Theoretically, state statutes inform guardians of reporting requirements and frequency. Moreover, reporting deadlines may be set out in the initial court order.[97] However, notification to guardians when the due date is approaching or has passed en-

96. ABA Commn., *supra* n. 35, at 23.

97. As noted in Part IV(C)(2) above, some 62.8% of the 2005 survey respondents said the court routinely specifies reporting and accounting requirements in the initial guardianship order or letter.

hances the consistency of timely filing. The 1991 ABA study noted that "[e]xperience and our survey indicate that unless courts take steps to enforce reporting requirements, few reports are filed."[98] The study observed the following: "In many courts it is common practice to notify guardians if reports and accountings are not filed on time."[99]

The 2005 AARP survey found that courts vary in the extent to which they notify guardians that reports are due or past due. A total of 63.8% of survey respondents indicated that the court "has an effective notification system in place," while 26.6% said there was no notification system in place, and 9.6% did not know. Without such a notice, guardians—particularly family guardians who may be unfamiliar with the process—may not understand or recognize the mandate for filing a report, and the judge may be left without adequate information about the ward and his or her assets.

What happens if guardians fail to respond to an initial notice? The *National Probate Court Standards* commentary indicates that "[t]he court should be prepared to investigate those situations where a guardian fails to submit any report required by the original order."[100] Guardianship statutes give judges an arsenal of sanctions to impose.[101] In the 2005 survey, respondents reported that state statute or court rule includes permanently removing the guardian upon failure to file (43%), holding the guardian in contempt (40%), suspending the appointment (32%), appointing a temporary successor guardian (28%), and denying the guardian's compensation (25%).[102]

How are these statutory sanctions translated into practice? The 1991 ABA study showed that courts are more likely to take

98. Hurme, *supra* n. 36, at 31.

99. *Id.* at 32.

100. NPCS, *supra* n. 42, at 72.

101. *See* 2005 Monitoring Chart, *supra* n. 5 (displaying all fifty states' guardianship statutes).

102. Additional responses included terminating the guardianship (23%), appointing an attorney for the individual (18%), reducing the guardian's fee (16%), collecting on the bond (16%), obtaining a judgment against the guardian (15%), imposing a surcharge (13%), reporting the guardian to the district attorney or law enforcement (10%), increasing the bond or other security (10%), attaching the guardian's assets (8%), ordering funds to a court-supervised account (7%), imposing a daily fine (7%), and imprisoning the guardian (3%). Some 17% of respondents indicated that the statute did not state any sanction, 18% did not know, and 1% did not reply.

action if an accounting is not filed than if a personal status report is not filed, but indicated that, overall, sanctions are not used "frequently."[103] Survey respondents in 2005 reported a range of court actions upon failure to file. The most common approach is to send the guardian a notice of delinquency (46.5%)—that is, a statement that the report is overdue. Entering show cause orders (or the local equivalent requiring that the guardian appear in court and explain why the report has not been filed) is also a frequent court action with 31.8% reporting routine use and 27.4% indicating use when appropriate. Only 13.2% said show cause orders are rarely used when a report is not filed in a timely manner. In addition, 15.5% of survey participants said court staff contact the guardian informally. Fines appear to be infrequent, with only 3.9% reporting them. Over 13% of survey respondents did not know what sanctions are imposed. In general, it appears that the sanctions most frequently used in practice (sending a notice of delinquency and entering a show cause order) are less rigorous than the full range of sanctions named as included in statute or court rule, perhaps because these are first steps the courts take to urge guardians to carry out their duties.

If the guardian is habitually late in filing reports or accountings, courts may be apt to take stronger measures. While a substantial number of respondents in the 2005 survey (39.3%) did not know what measures the court takes, close to half (48.6%) reported that the court requires such a guardian to appear for a status hearing. Over one-quarter (25.6%) said the court revokes the appointment and appoints a successor guardian; 16.0% said the court asks an investigator or volunteer to obtain more information; 11.1% indicated that the court removes the guardian from the appointment roster; 9.8% said the court appoints an attorney for the individual under guardianship; and a very small proportion said the court notifies a certification entity (2.6%) or surcharges the guardian's bond (1.6%).

103. Hurme, *supra* n. 36, at 33–34. In the 1991 survey, "[r]espondents from 108 counties identified the person who sent late account notices, while respondents from 94 counties identified the person who sent late status report notices." *Id.* at 33. Fourteen counties do not send late accounting notices, and 16 counties do not send late status report notices. *Id.* Also, respondents in 73 counties indicated that courts routinely issue show cause orders when accountings are not filed, and 53 counties do so when personal status reports are not filed. *Id.*

E. Procedures for Review

Without consistent court review and response, guardian reports serve little purpose other than having a possible sentinel effect. As one source observed, "if an annual guardian report is merely going to be placed in a file, unread or at most given a cursory review, it is nothing but a palliative that squanders the guardian's time and energy."[104] The Wingspread Conference urged courts to "increase the frequency and quality of report reviews";[105] the *National Probate Court Standards* set out the need for "written policies and procedures to ensure the prompt review of reports and requests";[106] and the Uniform Guardianship and Protective Proceedings Act calls for courts to establish a system for filing and review of reports.[107]

1. Designation of Reviewers

Clearly, someone with expertise must examine the reports and accountings for completeness and accuracy and flag any problems needing attention. The 1991 ABA study recommended that specific judges or court personnel be responsible for review of accountings and personal status reports.[108] It found that in about half the jurisdictions surveyed judges reviewed guardian reports, and in half clerks reviewed the reports, while accountings generally were examined by court auditors or clerks.[109]

In the 2005 survey, over half of the respondents (50.6%) indicated that financial accountings are reviewed by a court auditor or other court personnel for whom this is a primary responsibility. A significant number noted that the judge performs the review—26.6% said the judge who entered the order reviews the accountings, and 14% said a judge is assigned to review the accountings. Close to one-fifth of respondents (19.9%) reported that other court staff conduct the review, and 4.1% said volunteers conduct it. A very small proportion of respondents (3.9%) indicated that a gov-

104. Lawrence A. Frolik, *Abusive Guardians and the Need for Judicial Supervision*, 130 Trusts & Ests. 41 (July 1991).

105. ABA Commn., *supra* n. 35, at 23.

106. NPCS, *supra* n. 42, at 71.

107. Unif. Guardianship & Protective Procs. Act § 317(c).

108. Hurme, *supra* n. 36, at 40–42.

109. *Id.* at 42.

ernmental entity conducts the review. Finally, 8.5% of survey respondents said no one has the responsibility on a regular basis to review the financial accountings, and 11.1% did not know.

The 2005 survey also found that responsibility for regular review of personal status reports most commonly lies with a court investigator or other court staff for whom this is a primary task (36.7% of respondents) or by the judge who entered the order (30.5%). In other cases, the review may be conducted by a judge specifically assigned to do so (12.4%), other court staff (22.0%), or volunteers (3.4%). A few respondents (5.2%) indicated that a government entity conducts the review.[110] Notably, 12.1% of survey respondents said no one has regular responsibility for conducting the review, and 12.1% did not know.

2. Review Criteria

The 1991 study recommended the establishment of specific review criteria, maintaining that "[s]et criteria assist the reviewer in knowing what to look for in the documents and aid the guardian in understanding what information the court expects."[111] The 2005 survey found that review is guided by state statutes (28.7% of respondents), state court rules or policies (7%), and local courts' rules (17.1%). Close to one-quarter of respondents said there are no specific standards to guide review, and 22.5% did not know.

3. Review of Need to Continue Guardianship

Since the condition and circumstances of the incapacitated person may change over time, there is a need to determine periodically whether guardianship is still necessary. According to the *National Probate Court Standards*, "[t]he probate court should adopt procedures for the periodic review of the necessity for continuing a guardianship. A request by the respondent for a review of the necessity for continuing a guardianship should be addressed promptly."[112] Currently, twenty-nine state statutes in-

110. For instance, in Virginia the local departments of social services conduct the review. *See* 2005 Monitoring Chart, *supra* n. 5 (displaying all fifty states' guardianship statutes).

111. Hurme, *supra* n. 36, at 37.

112. NPCS, *supra* n. 42, at 72.

clude provisions requiring or permitting court review of continuing need.[113] The 1991 ABA study found that status-review procedures "vary from county to county."[114]

In the 2005 survey, almost half of those responding indicated that the court holds hearings on the need to continue or modify the guardianship upon request (47.8%), 31% said the court holds hearings as it deems necessary, 7.5% said the court holds hearings regularly, 5.9% said the court does not hold hearings, and 7.8% did not know. Thus, a review of the need to continue the guardianship does not appear to be periodic, as called for by the probate standards, but rather episodic.

F. Verification and Investigation

Quality monitoring requires going beyond a paper review to verify the accuracy of the reports and accounts and investigate the financial and personal well-being of the incapacitated person. The 1988 Wingspread Conference recommended that courts "use supplemental means such as volunteers, review boards and investigators to verify the contents of the report and the circumstances of the ward,"[115] and the 1991 ABA study urged courts to establish verification procedures, investigate complaints, use volunteers to monitor the individual's personal condition, and use other methods for verification and investigation.[116]

Verifying the information in a guardian's report requires having someone visit the individual to check on living arrangements, changes in condition or needs, frequency of guardian visits, and implementation of any care plan. Some courts have used volunteers, and in the 1990s the AARP Volunteer Guardianship Monitoring Project used trained AARP members to visit incapacitated persons, verify report information, and relay any concerns to the court.[117] California has long relied on a statutory system of pro-

113. *See* 2005 Monitoring Chart, *supra* n. 5 (displaying all fifty states' guardianship statutes).

114. Hurme, *supra* n. 36, at 54. Respondents from thirteen states indicated that status-review hearings were routine, but others from different counties in the same states did not list status hearings as routine. *Id.*

115. ABA Commn., *supra* n. 35, at 24.

116. Hurme, *supra* n. 36, at 45.

117. *See id.* at 9 (explaining the AARP volunteer initiative).

bate court investigators who regularly visit each individual under guardianship.[118]

1. Verification of Guardian Reports

The 2005 survey found that no one is designated to verify the information in the jurisdictions of 34.4% of the survey respondents. In 16.8% of the surveyed jurisdictions, court staff verify as needed, and in 10.1% court staff verify each report. In 5.9% of jurisdictions, a special master, *guardian ad litem*, or other person verifies each report, and in only 2.6% of jurisdictions, such investigators verify as needed. Thus, only 16% of respondents reported that someone at the court verifies every report. Volunteers verify as needed in 3.4% of jurisdictions and regularly in 2.6%. Some 23.8% of respondents did not know.

2. Visits to Person under Guardianship

A related question on the 2005 survey inquired specifically about visits to the incapacitated individual. A striking finding was that no one visits in the jurisdictions of 40.3% of those responding. Visitors in the remaining jurisdictions include special masters, *guardians ad litem*, or other persons on a regular basis (14.2%) and as needed (12.4%); court staff on a regular basis (6.5%) and as needed (4.9%); and volunteers on a regular basis (5.2%) and as needed (4.1%). Only about a quarter of respondents (25.9%) reported that someone visits the person regularly. Some 12.4% of respondents did not know.

3. Verification of Accountings; Triggers for Further Inquiry

Because financial management of the incapacitated person's assets is critical, courts also require systems to verify and investigate the financial information in accountings. Special auditors, commissioners of accounts, trust clerks and attorneys, or certified public accountants can conduct such investigations. A key question in an investigation of financial information is whether it triggers an inquiry of the incapacitated person's well-being if a possible problem is uncovered, thus calling for closer judicial scru-

118. *Id.* at 46.

tiny.[119] Close to 38% of the 2005 AARP survey respondents said the court investigates in such a situation, 13.4% said review of the financial information focuses only on the bottom line to determine if the calculations are correct, and 25.1% said that consideration of the individual's well-being in a review of the accounting varies by judge, examiner, and case. Some 23.8% did not know.

4. Response to Complaints

Finally, an important facet of verification is the court's response to complaints. The *National Probate Court Standards* commentary emphasizes that the courts should be "especially attentive to complaints of abuse and be prepared to investigate their validity immediately."[120] The 1991 ABA study recommended designating someone to investigate complaints and verify information.[121]

The 2005 AARP survey found that the most common court response to complaints—reported by over half of the survey participants—is to appoint a *guardian ad litem*, special master, or visitor to investigate (51.9%). Other common practices include entering a show cause order or setting a hearing (41.9%) and contacting the guardian (37.0%). In addition, courts may ask court staff to review the complaint (21.7%) or use volunteers to investigate (8.5%). Some 7.2% of respondents indicated that there is no mechanism in place to respond to complaints, and 14.7% did not know.

G. Sanctions

When guardians violate their duty of care and fiduciary responsibilities toward incapacitated persons, the court must take action. The *National Probate Court Standards* provide that "[t]he probate court should enforce its orders by appropriate means, including the imposition of sanctions," and that "[w]here the court learns of a missing, neglected, or abused respondent, it should take immediate action to ensure the safety and welfare of that

119. *Id.* at 45.
120. NPCS, *supra* n. 42, at 72.
121. Hurme, *supra* n. 36, at 45.

respondent."[122] Courts have a range of statutory sanctions for cases of malfeasance, including fines, contempt (declaring that a guardian has disobeyed court orders and will be punished), denial of compensation, suspension, removal, and more.[123]

The most common sanction the 2005 survey participants named was removal of the guardian and appointment of a successor guardian (67.2%), followed by imposing a fine (48.1%) and appointment of a *guardian ad litem* to investigate (33.3%). Courts may also make a referral to adult protective services (26.9%), report the guardian to law enforcement (26.6%), or report a guardian who is an attorney to the bar association (15.8%).[124] In some instances courts deny or reduce the guardian's fee (23.8%), and, less frequently, courts may increase the bond or other security. Some 7.8% of survey participants said the court does not generally impose sanctions or take other actions.

H. Funding for Monitoring

Good monitoring requires sufficient resources to fund staff, technology, training, and materials. The 1991 ABA study found that 52% of the guardianship experts surveyed named inadequate state appropriations as a barrier to monitoring, and 41% named inadequate local appropriations.[125] The study indicated that most jurisdictions rely on multiple funding sources and recommended that "[s]tate and local funding agencies should provide the courts with sufficient funds or revenues so the court will be able to monitor guardianship cases adequately."[126] Thirteen years later, the 2004 GAO report showed that funding remains a problem as follows: "Most courts surveyed said they did not have sufficient funds for guardianship oversight."[127]

122. NPCS, *supra* n. 42, at 73.

123. *See* 2005 Monitoring Chart, *supra* n. 5 (displaying all fifty states' guardianship statutes); *see also* Hurme & Wood, *supra* n. 9, at 913–914 (describing the various sanctions that courts may impose).

124. For a related issue, see *infra* Part IV(I)(4). If a guardian who is an attorney files reports late, 13.2% of respondents said the court files bar grievances when appropriate, 21.4% said such filing is rare, and only 0.3% said the court routinely files such grievances.

125. Hurme, *supra* n. 36, at 59.

126. *Id.*

127. GAO, *supra* n. 49, at 16.

The 2005 survey continues to demonstrate serious funding gaps. Approximately 43% of respondents stated that funding for monitoring is unavailable or clearly insufficient, about 17% responded that some funding is available, and only 10.9% responded that sufficient funds are available to the court. A significant number of respondents (28.4%) did not know whether the court has sufficient monitoring funds.

As for sources of monitoring funds, the majority of 2005 survey respondents who identified funding sources stated that their courts rely on multiple sources. The source named most frequently (45.5% of respondents) was "state legislative appropriation specifically for guardianship monitoring." After that, the most frequent sources are filing fees (16.5%); general appropriation for the judiciary (14.7%); county commission (11.6%); assessments against a person's estate for individual case investigations (9.0%); state judicial council or administrative office of courts (7.0%); fines or surcharges (1.8%); and public or private grants (1.6%). About 31% said there is no specific funding for guardianship monitoring, and 40% did not know.

I. Role of Attorneys

Attorneys play multiple roles in the guardianship process. They may represent petitioners, guardians, alleged incapacitated persons, or individuals for whom a guardian has been appointed, and they also may serve as *guardian ad litem* as well as taking on the duties of guardian after appointment. Both the court and the attorney must recognize the attorney's ethical responsibilities throughout the process.

The 1991 ABA study recommended that bar associations establish the following clear ethical guidelines for attorneys: attorneys for clients seeking to file guardianship petitions must fully inform the client of a guardian's responsibilities (including reporting and accounting requirements); attorneys for guardians must assist the guardian in fulfilling reporting requirements; and attorneys for wards must assist the court in monitoring the individual's well-being throughout the guardianship or until dismissed by the court.[128] The *National Probate Court Standards* state that

128. Hurme, *supra* n. 36, at 63.

if a guardian who is an attorney is acting inappropriately, "the court should advise the appropriate disciplinary authority that the attorney may have violated his or her fiduciary duties to the respondent."[129]

1. Ethical Guidelines

According to 18.6% of the 2005 survey respondents, their state bars have clear and complete ethical guidelines for attorneys representing the petitioner, guardian, ward, or potential ward. Some said that the guidelines are less than clear—14.2% said that the guidelines are clear in some aspects, 8% said the guidelines are murky concerning the roles of attorneys, and 9% said there are no applicable guidelines. Half of the survey respondents did not know whether their state bar associations have ethical guidelines for attorneys representing parties in a guardianship case—this is not surprising in that only 14.5% of survey respondents said that their primary role in the guardianship process is as an attorney.

2. Assistance with Reporting

After a guardian is appointed, an attorney may assist the guardian in fulfilling obligations, including reporting requirements. In the 1991 ABA survey, 56% of respondents indicated that new guardians routinely received advice from an attorney.[130] In the 2005 AARP survey, about half of the survey respondents (53.7%) stated that the extent to which attorneys for guardians assist guardians with reporting and accounting varies by attorney, guardian, or case circumstances. According to 16.3% of respondents, attorneys in their jurisdiction routinely provide extensive assistance with reporting requirements, while another 9.6% stated that attorneys provide some assistance. Just over 10% (10.9%) reported that attorneys do not generally assist the guardians, and 9.6% did not know.

129. NPCS, *supra* n. 42, at 73–74.
130. Hurme, *supra* n. 36, at 65.

3. Role of Attorney after Appointment

The 2005 survey indicates that the role of the attorney for the incapacitated individual in monitoring the person's well-being after a guardian is appointed varies greatly. According to a third of the respondents (33.1%), the attorney is dismissed by the court after the appointment and has no further role. Only 7.5% of respondents stated that the attorney remains the attorney of record and routinely stays actively involved throughout the guardianship case, while 26.9% of respondents said that the attorney remains the attorney of record, but his or her involvement varies or is infrequent. About 20% (20.2%) of respondents stated that the attorney remains involved until the court and the attorney determine that the attorney is no longer needed. The remaining 12.4% of respondents did not know.

4. Filing of Bar Grievance

How do courts treat guardians who are attorneys and are habitually late in filing reports? While a substantial majority of 2005 survey respondents (65.1%) did not know the answer, the remaining respondents indicate that it is rare for the court to file a grievance with the state bar. Only one respondent (0.3%) stated that the court routinely files grievances. Over 20% (21.4%) said that the court rarely files grievances, and 13.2% stated that the court files grievances when appropriate.[131]

J. Court-Community Interaction

The 1991 ABA study urged that courts be "aware of and encourage the efforts of other community groups and agencies that monitor wards' well-being."[132] If courts and community agencies are both engaged in monitoring the status of at-risk individuals, they can strengthen their effectiveness by working together. Such community entities might include adult protective services, long-term care ombudsman programs, state and area agencies on aging, guardianship associations, and bar association grievance

131. *Supra* pt. IV(G) (indicating that 15.8% of respondents said that if a guardian who is an attorney demonstrates malfeasance, the court files a report with the state bar).

132. Hurme, *supra* n. 36, at 3.

committees. For instance, adult-protective-services staff may investigate reports of suspected abuse, neglect, or exploitation in which a guardian is involved. A long-term care ombudsman may encounter a nursing home or assisted living resident who is not receiving needed attention from a guardian. If there is a regular channel for such community actors to report guardian abuse or neglect to the court, the judge can take needed corrective actions.

Moreover, broader guardianship-reform recommendations over the years have encouraged court-community linkages. The 1988 Wingspread Conference urged states to create "multidisciplinary guardianship and alternatives committees" to plan for reform (including monitoring) and enhance education of all stakeholders.[133] The 2001 Wingspan Conference charged state and local jurisdictions to create "an interdisciplinary entity focused on guardianship implementation, evaluation, data collection, pilot projects and funding."[134] Such interdisciplinary court-community committees could target guardian accountability.

In addition, Social Security field offices are responsible for appointing and monitoring representative payees, who may or may not be the same individuals or entities as the guardian.[135] The Department of Veterans Affairs (VA) appoints and monitors fiduciaries to handle benefits for incapacitated veterans. The 2004 GAO report found that state courts handling guardianship, Social Security offices, and VA offices lack coordination even though they serve the same population of at-risk individuals.[136] The report noted that the courts and the federal agencies

> do not systematically notify [each other] . . . when they discover that a guardian or a representative payee is abusing the incapacitated person. This lack of coordination may leave incapacitated people without the protection of responsible guardians and representative payees.[137]

133. *See* ABA Commn. on the Mentally Disabled, *Guardianship—An Agenda for Reform*, 13 Mental & Physical Disability L. Rptr. 271, 280 (1989) (providing recommendations and commentary from the National Guardianship Symposium).

134. Wingspan, *supra* n. 45, at 596.

135. *Id.*

136. GAO, *supra* n. 49, at "What GAO Found" (introductory section).

137. *Id.*

The 2005 survey revealed that interaction between courts and community entities concerning guardianship monitoring is relatively infrequent. More than a quarter of survey participants (25.3%) indicated that the court is aware of such groups and communicates from time to time, and just under a quarter (24%) said the court has little contact. A small proportion of survey respondents said that the court does participate in multidisciplinary groups on guardianship and alternatives (10.9%) or collaborates with such groups on training and education (10.9%). In just a few cases (5.7%), the court has developed referral protocols with community groups. Many respondents (23.3%) did not know the relationship.

K. Data Systems and Court Technology

1. Court Maintenance of Guardianship Data

The 2004 GAO report highlighted a grave lack of hard data on adult guardianship. It found that only one-third or fewer of the responding courts surveyed tracked the number of active guardianships for incapacitated adults and concluded that the dearth of statistical data limits oversight and efforts to improve the guardianship system.[138] The report observed the following:

> Neither the states nor the federal government compile data concerning the incidence of abuse of people assigned a guardian or representative payee or even the number of elderly people with guardians. Without better statistical data concerning the size of the incapacitated population or how effectively it is being served, it will be difficult to determine precisely what kinds of efforts may be appropriate to better protect incapacitated elderly people from exploitation, abuse, and neglect.[139]

The GAO findings reflect continuing concern with lack of guardianship data over the course of many years. In 1994, experts from the National Center for State Courts noted that a

138. *Id.* at 3.
139. *Id.* at 31.

> pervasive problem for organizations examining the use of guardianship for the elderly has been the lack of accurate or reliable information concerning the number of persons actually under the protection of a guardian in the United States.[140]

A later law review article also stressed "the absence of 'hard' data" to evaluate the process and the changes that have occurred.[141] The 2001 Wingspan Conference recommended that a "uniform system of data collection within all areas of the guardianship process be developed and funded" and urged that courts "maintain adequate data systems to assure that required plans and reports are timely filed."[142] A study of state-level guardianship data completed by the ABA Commission on Law and Aging for the National Center on Elder Abuse in 2006 found that only 34% of state court administrative offices receive from trial courts reports on filings and dispositions for adult guardianship of the person and/or property as a distinct case type, but close to two-thirds (66%) do not.[143]

In the 2005 survey, a substantial portion of survey respondents (40%) did not know how the court maintains data on adult-guardianship cases. Almost half of the remaining respondents (27.6%) said the court has a computerized system to track the number of adult-guardianship filings and dispositions. Some 12.7% of the respondents indicated that the court does not maintain data on guardianship cases other than in individual case files, and 11.4% said the court's data system for guardianship cases is uneven, inconsistent, or in the process of change. Only 8% stated that the court has a computerized system that tracks and aggregates not only the number of filings and dispositions but also additional data elements.

The 2005 survey sought information about specific data elements for which the court maintains statistics. By far the most

140. Paula L. Hannaford & Thomas Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 Elder L.J. 147, 154 (1994).

141. Lawrence Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 Stan. L. & Policy Rev. 347, 351 (1998).

142. Wingspan, *supra* n. 45, at 596, 606.

143. Erica Wood, *State-Level Adult Guardianship Data: An Exploratory Survey* 6 (Natl. Ctr. on Elder Abuse 2006) (available at http://www.elderabusecenter.org).

common data element—indeed, the keystone for monitoring—was guardian actions on behalf of the ward (82.7%). Over one-fifth of respondents (22.2%) said the court maintains statistics on the timeliness of guardian reports, and close to one-fifth indicated maintenance of data on whether the incapacitated person was represented by counsel at the time of adjudication (18.9%) and on the age of the individual (18.3%). Responses for other data elements were lower as follows: 14.5% of survey participants selected information on income, assets, and expenses of the individual; 14.2% selected the reason the case was initiated; 12.7% selected the individual's condition at the time of adjudication; and 6.2% selected information on social services provided to the person.

One additional data element concerns whether the case involved elder abuse. This is important because there is currently wide consensus that there is no clear picture of the incidence and prevalence of elder abuse in the United States—and that such a picture "is imperative to enable society to . . . mount an effective response."[144] Court data on guardianship cases involving elder abuse (either as a reason for the guardianship or in which the guardian is the perpetrator) could contribute significantly to the knowledge base. Yet the 2006 study on state-level guardianship data for the National Center on Elder Abuse found that elder abuse as a distinct case type is reported by trial courts to state court administrative offices in only five states.[145] Only 9.3% of respondents in the 2005 survey said that the court maintains data on whether the case involved elder abuse.

2. Court Technology

Since the 1991 ABA study on monitoring, court technology has undergone a sea change. Today, the National Center for State

144. Bonnie & Wallace, *supra* n. 30, at xiv. Note that there are widely differing definitions of "elder abuse." According to the National Center on Elder Abuse, "[e]lder abuse is a term referring to any knowing, intentional, or negligent act by a caregiver or any other person that causes harm or a serious risk of harm to a vulnerable adult. The specificity of laws varies from state to state, but broadly defined, abuse may be" as follows: physical abuse, emotional abuse, sexual abuse, exploitation, neglect, and abandonment. Natl. Ctr. on Elder Abuse, *Frequently Asked Questions*, http://www.ncea.aoa.gov/ncearoot/Main_Site/FAQ/Questions.aspx (accessed Mar. 3, 2008).

145. Wood, *supra* n. 143, at 6. A few additional states expect to maintain such data in the future.

Courts estimates that, collectively, courts spend in excess of $500 million annually on information technology.[146] Moreover, computer applications and software are continually changing, and courts are continually developing or procuring new systems.

The 2005 survey sought information on the extent to which these vast changes in court technology affect guardianship monitoring. Respondents selected computer applications used by the court in guardianship monitoring. While more than 40% of respondents (44%) did not know how the court uses computer technology, over one-third (36.2%) indicated that the court uses computer technology to identify late filings.[147] It appears that other uses of computer technology in performing monitoring functions are quite rare. Only very small proportions of respondents said such technology is used to e-mail the guardian about the reporting status (3.9%) or for any of the following: to enable the guardian to file an account on the court's Web site (0.3%), file an account by e-mail (1.6%); file a personal status report on the court's Web site (1.3%); file a personal status report by e-mail (2.1%); check the report status and due date on the court's Web site (4.1%); check the report status and due date by e-mail (0.8%); or ask questions about the case by e-mail (5.7%). A substantial 22% of respondents stated that computer technology is not available for guardianship monitoring.

3. Public Access to Guardianship Files

Guardianship files include sensitive private information on health conditions, mental disabilities, finances, and such identifying information as addresses and Social Security numbers. Good monitoring requires that full information be maintained. A critical question is to what extent this information is and should be available to the public, particularly if the files can be accessed on the Internet. Privacy and the potential for exploitation argue that the files should be sealed and available only for limited purposes, yet public access to guardianship monitoring can help to ensure

146. Kenneth R. Palmer, *Technology Standards: The National Consortium on State Court Automation Standards—A White Paper*, http://www.ncsconline.org/D_Tech/standards/whitepaper.asp (accessed Mar. 3, 2008).

147. This appears inconsistent with the finding noted earlier that 22.2% of respondents said the court maintains statistics on the timeliness of guardian reports.

full accountability. A 2004 meeting on the implementation of the Wingspan recommendations expressed the following basic tension in one of its monitoring recommendations: Since the information created as a result of enhanced monitoring and oversight raises serious questions of privacy and confidentiality concerning vulnerable people, each state and jurisdiction should address the issues of privacy and confidentiality when implementing programs of guardianship-monitoring reform.[148]

In light of technological innovations enabling courts to "broadcast" information in court records on the Internet, numerous state courts and legislatures have examined the issue of how to balance public access, personal privacy, and public safety. For example, a 2005 California court rule requires electronic guardianship case records to be accessible electronically at the courthouse itself but not remotely.[149] The Supreme Court of Florida's Committee on Privacy and Court Records recommended in 2005 that psycho-social evaluations, psychological evaluations, and *guardian ad litem* reports be placed under seal by the clerk of court.[150]

The 2005 survey inquired about the extent to which guardianship case files are open to the public. Close to one-third of respondents (30.2%) indicated that part of the file is open to the public but part is sealed, and nearly another third (28.9%) said the entire file is open and is available at the courthouse. In some instances, guardianship files are sealed but can be opened under specific circumstances with court approval (7.2%) or are furnished routinely to specific interested persons to verify information or object to actions by the guardian (5.7%). Only a handful of respondents said the entire file is open and accessible through the Internet (3.9%) or that the entire file is sealed (4.1%). Some 19.9% of respondents did not know.

148. Wingspan 2004, *supra* n. 46, at 12.

149. Cal. R. Ct. 2.503 (2007).

150. Fla. R. of Jud. Administration Comm., *In Re: Recommendations of Supreme Court Committee on Privacy and Court Records* 3 (2006) (available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/06/Comments/Filed_02-01-2006-CommentsRulesJudicialAdministrationCommittee.pdf).

V. DISCUSSION OF FINDINGS AND CONCLUSIONS

Guardianship originally grew out of the fourteenth-century English concept of *parens patriae*—the duty of the King, and later the state, to protect those unable to care for themselves.[151] The court, on behalf of the state, appoints a guardian to carry out the duty of protection, and the guardian is bound by high standards of care and accountability. A critical part of the court's protection is oversight of the guardian at the "back end" of the process. Without monitoring, the court cannot be assured of the welfare of society's most vulnerable members. Indeed, monitoring is at the very core of the court's *parens patriae* responsibility.

At the same time, monitoring is somewhat at odds with the traditional passive stance of probate courts. The Uniform Guardianship and Protective Proceedings Act sprang from the Uniform Probate Code, whose drafters envisioned the court's role, according to one commentator, as "wholly passive until some interested person invokes its power to secure resolution of a matter. [The Court] should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought."[152] The idea was to streamline the probate process by lessening the court's involvement in the administration of estates. Moreover, a general passive philosophy is sometimes expressed in judicial settings as the notion that the court is an independent arbiter, not "a place for the delivery of social services."[153]

This perception may still be pervasive in some probate courts and may be effective in handling decedents' estates; however, it is not in accord with the court's active *parens patriae* duty. Individuals under guardianship are living beings whose needs change and who are powerless to voice concerns because

> [u]nlike probate, serving as guardian is a responsibility that may change over time, last for many years, and include excruciatingly complex decisions about medical treatment,

151. *See* Wright, *supra* n. 14, at 56–66 (providing a historical overview of guardianship and the concept of *parens patriae*).

152. Hurme, *supra* n. 36, at 6 (quoting Unif. Prob. Code art. III gen. comment (1987)).

153. Frank A. Johns, *Guardianship Folly: The Misgovernment of* Parens Patriae *and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?* 27 Stetson L. Rev. 1, 78 (1997).

placement, and trade-offs between autonomy and beneficence.[154]

In addition to these historical and philosophical bases for strong monitoring, there are practical considerations as well. First, monitoring can help guardians. Reporting to the court and facing inquiries if something is amiss informs guardians of the court's—and society's—expectations. It can provide useful feedback and support in a demanding role. Second, monitoring can "boost the court's image and inspire public confidence."[155] Consistent oversight of guardians lets the public know that the court is in charge, prevents damaging press exposés, and can help to garner court funding.

In short, monitoring is a must; but in reality, it varies substantially from court to court. The 2005 AARP survey findings offer a snapshot of adult-guardianship-monitoring practices fifteen years after the 1991 ABA study. The current survey comes at a critical time. In 2006, the first baby boomers turn sixty, signaling much greater use of the guardianship system in coming years.[156] Meanwhile, guardianship practices are again under censure by the press, courts struggle to secure funding allocations in a highly competitive environment, and rapid changes in information technology continue to revolutionize the way we communicate. Salient themes in the overall survey findings include the following:

- **Guardianship-Monitoring Practices Continue to Show Wide Variation.** It is not surprising that the survey confirmed expectations that monitoring practices vary dramatically in almost every aspect, just as they did fifteen years earlier. For instance, survey responses showed a great range in key areas such as court assistance to guardians, practices in notifying guardians of filing deadlines, actions on late filings, designation of reviewers, response to complaints, re-

154. Hurme & Wood, *supra* n. 9, at 926–927.

155. *Id*. at 872.

156. In February 2008, the first baby boomer made history by receiving her first Social Security retirement benefit. Social Security Online, *Nation's First Baby Boomer Receives Her First Social Security Retirement Benefit*, http://www.ssa.gov/pressoffice/pr/babyboomer-firstcheck-pr.htm (Feb. 12, 2008).

view of the need to continue the guardianship, use of sanctions, and roles of attorneys in promoting guardian accountability. This "patchwork" of practices makes it difficult to assess and describe monitoring methods overall—yet it offers the potential that in the broad spectrum are some "promising practices" that stand out in effectiveness and could be replicated by other courts. The national study begun in 2005 will identify and examine such specific practices in the second phase.

- **Reporting Practices Have Advanced over the Past Fifteen Years in Some Key Aspects.** While the 1991 study did not provide enough statistical detail in many areas for direct comparison to the information collected in 2005, it appears that reporting practices have moved forward in some respects:
  - *Filing of Personal Status Reports.* In 1991, 67.5% of respondents said that personal status reports were required by the court,[157] compared with 74.2% of respondents in 2005. While not a huge increase, the rise shows progress in information provided to the court about the well-being of the individual. Moreover, although the 1991 study did not include a finding on the format of the guardian's report, a majority of respondents reported in 2005 that courts require a moderate amount of detail. Thus, not only are more courts getting regular information, but the information may more often give insight into the person's actual circumstances and condition.
  - *Compliance with Statutory Reporting Provisions.* In 1991, forty-three state statutes required personal status reports, yet respondents in only eighteen states said the court uniformly required such reports.[158] In the rest of the states, respondents either said the court did not require reports or their

157. Hurme, *supra* n. 36, at 17.
158. *Id.*

responses were variable.[159] By 2005, 89.4% of respondents said the state statute requires reports at some regular interval,[160] and 83.8% of respondents said the court requires reports on some regular basis. Thus, it appears that some courts still are not complying with statutory mandates for reporting, but that the gap between statute and practice on reporting seems to have narrowed substantially.

- *Use of Guardianship Plans.* In the 1991 study, the concept of a guardianship plan on the future care of the individual was still so new that no data were collected on plan use.[161] Only five state statutes required plans.[162] By 2005, at least ten state statutes provided for plans,[163] and in the survey, more than 34% of respondents reported that the court requires guardians to file forward-looking plans. Moreover, according to respondents, slightly more local courts consistently or sometimes require the filing of plans than is provided for in statute or court rule.

- **Use of Technology in Monitoring Is Minimal; Greater Use of Computer Technology Could Effect a Paradigm Shift in Monitoring Practices.** Today, courts have computer-application options that were unheard of in 1991. There are considerable opportunities for Web-based and e-mail monitoring techniques to strengthen guardian accountability. Yet the 2005 survey found surprisingly low use of such technology in courts with jurisdiction over guardianship. Indeed, 22% of respondents stated that the court does not use computer technology in monitoring. Further, while just over one-third said the court uses computers to identify

159. *Id*.

160. According to the ABA statutory chart on monitoring, all except two states have provisions for a report. *See* 2005 Monitoring Chart, *supra* n. 5 (displaying all fifty states' guardianship statutes).

161. *See generally* Hurme, *supra* n. 36 (excluding data relating to plan use from the report).

162. *Id*. at 22.

163. *See* Hurme & Wood, *supra* n. 9, at 895–896 (listing the statutes that require a guardianship plan).

late filings, other key monitoring uses—notifying guardians of late filings and allowing guardians to file or to submit questions electronically—were next to negligible.

Notification to the guardian that a report or account is overdue is a case in point. Close to two-thirds of respondents (63.8%) said the court has some type of notification system in place, but over a quarter (26.6%) said the court has no notification system. Of the notification systems in place, it appears that very few are electronic—only 3.9% of respondents said the court e-mails the guardian about the reporting status, and only 4.1% said the guardian could check the status of reports and the due date on the court's Web site. While funding may be involved in setting up such a system, once it is in place there is very little cost. Notifying guardians automatically by e-mail of upcoming due dates appears a simple and straightforward approach that could have "big bang for the buck." Moving a step beyond this by allowing guardians to file either on the Web or by e-mail could greatly ease their burden and dramatically increase the filing rate. (Note that almost one-third of respondents stated that reporting forms are on the court's Web site. While this is helpful, it still requires the guardian to print the forms out, fill them out manually, and mail them in—not an inviting prospect for busy fiduciaries.)

Additionally, computer applications could be used in maintaining guardianship data, which would be useful not only in monitoring but also to policymakers in assessing the guardianship system as a whole. Respondents indicated that few courts maintain statistics (at least beyond those on initial filings and dispositions)—for instance, on representation by counsel, age, income and assets, condition, reason the case was initiated, services provided, and whether elder abuse was involved either before or after appointment. Effective software systems could provide significant benefits to courts and policymakers.

Computer technology also raises privacy issues not on the radar screen in 1991. If guardianship files—including identifying information as well as health and financial status—are maintained electronically, just how public should they be? The widely differing survey responses on

whether guardianship case files are open to the public (electronic or not) shows that courts are grappling with the problem. It is clear that privacy and confidentiality issues in guardianship monitoring merit further study.

- **Guardian Training Has Increased but Remains a Compelling Need.** In 1991 almost half of the respondents (48%) named lack of guardian training as a serious problem.[164] In 2005, over 40% of respondents said court-provided written instructions or manuals were available to guardians, and more than a third said training sessions were sponsored by noncourt entities. Over a quarter (27.1%) reported multiple training resources available to guardians, which appears to be an advance. Indeed, in the fifteen years between the two studies, a host of guardian handbooks, videos, and curricula have appeared.[165]

  Training continues to be a significant unmet need, however. Over a fifth (22%) of respondents stated that no resources are available to guardians. In addition, it is notable that more than 40% of respondents indicated that no samples of appropriately prepared personal status reports and accountings were available. Thus, many must tackle the challenge of serving as guardian and reporting to the court with little if any guidance or support. Clear and concise written instructions, training materials, and a contact point for technical assistance seem to be cost-effective practices that can help prevent later problems.

- **Verification of Guardian Reports and Accounts, as well as Visits to Individuals under Guardianship, Is Frequently Lacking.** While useful, guardian reports and accounts may not necessarily be accurate or complete. Without independent investigation, there is only a paper review at best. What is needed are mechanisms that serve as the "eyes and ears" of the court, checking on vulnerable individuals and flagging any problems. Yet, in the 2005 survey, more than one-third of respondents (34.4%) said no one is

164. Hurme, *supra* n. 36, at 28.

165. *See* Hurme & Wood, *supra* n. 9, at 877–888 (describing the various training materials available in different states).

designated by the court to verify the information in reports and accounts. Additionally, only 16% of respondents reported that the court verifies every report, rather than verifying randomly or as needed. This leaves a significant portion of reports and accounts without audit and causes the court to have to rely on the good faith of the guardian.

Of equal concern, over 40% of respondents stated that no one is assigned to visit the vulnerable individual, and only one-quarter said someone visits the person regularly—leaving ample room for actions by guardians who may be inclined toward negligence or malfeasance.

- **The Role of Volunteers in Monitoring Is Minimal, yet Offers Potential.** Around the time of the 1991 ABA study, AARP was initiating a Volunteer Guardianship Monitoring Project that eventually took hold in over fifty courts across the nation before national support concluded in 1997.[166] Some courts continue to use retired volunteers in a monitoring capacity, and at least a few others use social workers or other students.[167] Responses to several of the 2005 survey questions reveal an overall limited use of volunteers—only 4.1% said volunteers review financial accountings; 3.4% said volunteers review personal status reports; 3.4% stated that volunteers verify guardian reports; 5.2% said volunteers visit the person under guardianship; and 8.5% said the court uses volunteers to investigate complaints.

  Certainly, volunteers require recruitment, training, and supervision, which represents a significant investment of court resources. Yet, in the long run, volunteers may prove their worth in guardianship monitoring. It is a concept that deserves renewed focus. Indeed, with baby boomers on the verge of retirement, a large pool of professionals will be

166. *See* Hurme, *supra* n. 36 at 49 (describing the AARP volunteer initiative); *see generally* Miler & Hurme, *supra* n. 39 (paying particular attention to the AARP project).

167. AARP, *AARP Brings Guardianship Monitoring Program to Wisconsin*, http://userpages.itis.com/cwag/gardaarp.htm (accessed Mar. 3, 2008); Fourth Jud. Dist., Idaho, *Ada County Guardianship Monitoring Program*, http://www2.state.id.us/fourthjudicial/Guardianship%20Monitoring%20Program/Guardianship.htm (last updated Feb. 21, 2008); Sally Balch Hurme, *Guardian Accountability* in Quinn, *supra* n. 68, at 176–177; Tarrant Co. Prob. Ct., *Volunteer Court Visitor Program*, http://www.tarrantcounty.com/eprobatecourts/cwp/view.asp?A=766&Q=430965 (accessed Mar. 3, 2008).

available and may be looking for such public service opportunities.

- **Court-Community Action on Monitoring Is Infrequent, yet Could Enhance Oversight.** Every major set of guardianship-reform recommendations since 1988 has stressed the need for court-community linkages. Courts with scarce resources could leverage their monitoring efforts by interaction with community entities such as adult protective services and the long-term care ombudsman program.

  The 2005 survey showed a paucity of such interaction, however. Only slightly over 10% of respondents stated that the court collaborates with community groups on training. One-quarter of respondents said the court is "aware" of such entities and may have intermittent contact, and one-quarter said the court has little contact. Courts very rarely file state bar grievances concerning guardians who are attorneys.

  An increase in community collaboration could reap significant benefits in monitoring.[168] For instance, ombudsmen frequently encounter guardianships as they visit long-term care residents and could be trained and asked to report any problems directly to the court. Agencies on aging under the Older Americans Act[169] may be helpful in identifying volunteers to serve in a monitoring capacity. Adult-protective-services staff offices can exchange information with courts on guardians who are serving as representative payees.[170]

- **Funding for Guardianship Monitoring Remains Minimal.** In the 1991 study, 52% of respondents named inadequate state funding and 41% named inadequate local funding as a barrier to monitoring.[171] In 2005, 43.4% of respondents said funding for monitoring is unavailable or insufficient. The figures are not directly comparable, but they do

168. *See* ABA Commn. L. & Aging, *Good Guardianship: Promising Practice Ideas on Community Links* (ABA 2004) (available at http://www.ncea.aoa.gov/NCEAroot/Main_Site/pdf/publication/guardianshipcommunitylinks.pdf) (accessed Mar. 3, 2008) (listing the benefits of community involvement).

169. 42 U.S.C. §§ 3001–3058 (2007).

170. ABA Commn. Leg. Probs. of the Elderly & Ctr. Children & the Law, *State Guardianship and Representative Payment: Enhancing Coordination of State Courts with the Federal Representative Payment Program* (ABA 2001).

171. Hurme, *supra* n. 36, at 59.

seem to show that a critical funding gap remains. Lack of funds affects every aspect of monitoring—it keeps courts from procuring necessary staff (file reviewers, investigators, and auditors), training programs, computer technology, and data management. Over 30% of respondents indicated that their court has no specific funding for guardianship monitoring. Heightening the awareness of state legislatures, county commissions or boards, and judicial councils concerning the urgent need for monitoring resources is an important step in securing the welfare of vulnerable at-risk individuals under guardianship.